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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-834

OGDEN CORPORATION, OGDEN MANAGEMENT CORPORATION, OGDEN AMERICAN CORPORATION, LURIA BROTHERS & COMPANY, INC. and WILLIAM J. LURIA,

Petitioners,

v.

LURIA STEEL & TRADING CORPORATION and HYMAN-MICHAELS COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole question presented is whether a proceeding under Section 5 of the Federal Trade Commission Act, instituted by the Federal Trade Commission for the

purpose of preventing or restraining violations of the antitrust laws, suspends the running of the statute of limitations applicable to a private damage action under the antitrust laws.

COUNTERSTATEMENT OF THE CASE

This is a private antitrust action instituted pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15. The complaint alleges that the defendants have attempted to monopolize the iron and scrap steel business in the United States, have combined with co-conspirators to unreasonably restrain trade in the domestic scrap business and to monopolize it, and have combined with co-conspirators to restrain and monopolize foreign trade in the scrap business, all in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §12.

The complaint herein also charges the defendants with selling scrap on condition that purchasers not buy from others in violation of Section 3 of the Clayton Act, 15 U.S.C. §14, and with making acquisitions of competitors in violation of Section 7 of the Clayton Act, 15 U.S.C. §18.

Respondents' complaint is based in substantial part on matters involved in a Federal Trade Commission proceeding, *In the Matter of Luria Brothers and Company, Inc., et al.*, Docket No. 6156, filed January 19, 1954, which charged Luria Brothers and others with a variety of anticompetitive activites similar to those charged in the instant case, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, and with violations of Section 7 of the Clayton Act.

In that FTC proceeding, the hearing examiner found violations of both Section 5 of the FTC Act and Section 7 of the Clayton Act, and the Commission affirmed. *In the Matter of Luria Brothers and Company, Inc.*, 62 F.T.C. 243 (1962). The Court of Appeals for the Third Circuit affirmed the Commission's decision and order, *Luria Brothers & Co. v. Federal Trade Commission*, 389 F.2d 847 (3d Cir. 1968), and this Court denied *certiorari*, 393 U.S. 829 (1968).

Petitioners moved for partial summary judgment below to bar all damage claims which accrued before October 10, 1965, on the ground that such claims are barred by the applicable statute of limitations, 15 U.S.C. §15b. Respondents opposed petitioners' motion on the basis of the tolling provisions of Section 5(b) of the Clayton Act, 15 U.S.C. §16(b). More specifically, respondents contended that the FTC proceeding suspended the running of the statute of limitations either or both because (1) it was brought under Section 7 of the Clayton Act, one of the "antitrust laws", and (2) it was a proceeding under Section 5 of the FTC Act to "prevent, restrain, or punish violations" of the antitrust laws.

OPINIONS BELOW

1. The District Court

The District Court held that since the FTC proceedings were instituted, in part, under the Clayton Act, the statute of limitations was tolled. Judge Broderick reasoned that prior to the 1955 Clayton Act amendments, an FTC proceeding could not toll the statute since it was not a "proceeding in equity", but that tolling began on January 1, 1956, the effective date of the 1955 amendments which

changed the language of Section 5(b) from "proceeding in equity or criminal prosecution" to "civil or criminal proceeding". Consequently, he held the damage cutoff date to be January 1, 1952, four years prior to the 1956 date when he determined tolling began. By virtue of his ruling that the FTC Clayton Act proceedings suspended the running of the statute of limitations, Judge Broderick did not find it necessary to fully analyze plaintiffs' contention that since the FTC proceeding under Section 5 of the FTC Act was one instituted to prevent antitrust violations, it too operated to toll the statute. Although impressed with the reasoning of three recent cases holding that an FTC action to enforce Section 5 of the FTC Act may toll the statute, he felt "constrained to follow the apparent distinction recognized in the *New Jersey Wood* case "between FTC actions to enforce the Clayton Act on the one hand, and Commission actions under the FTC Act on the other." *New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co.*, 332 F.2d 346 (3d Cir. 1964) *aff'd.*, 381 U.S. 311 (1965).

2. The Court of Appeals

The Court of Appeals for the Third Circuit granted permission to appeal under 28 U.S.C. §1292(b), and affirmed Judge Broderick's decision, although on different grounds, holding that an FTC proceeding under Section 5 of the FTC Act operates to toll the statute of limitations if the proceeding is aimed at "an existing or incipient violation" of the antitrust laws.

REASONS FOR DENYING THE WRIT

The sole question raised by this appeal, *i.e.*, whether a Section 5 FTC Act proceeding can suspend the running of the statute of limitations, has been answered affirmatively by the Court of Appeals for the Seventh Circuit as well

as by the court below. Consequently, no conflict between circuits exists. Moreover, this Court's decision in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 382 U.S. 54 (1965), require the result below.

The question of the applicability of Section 5 FTC Act proceedings to Clayton Act Section 5(b) tolling has been considered in four other cases, and in three of those the decision was as below. *Rader v. Balfour*, 440 F.2d 469 (7th Cir. 1971), *cert. denied, sub nom.; Alpha Chi Omega v. Rader*, 404 U.S. 983 (1971); *In re Antibiotic Antitrust Actions*, 333 F.Supp. 317 (S.D.N.Y. 1971); *Lippa's, Inc. v. Lenox, Inc.*, 305 F.Supp. 182 (D.Vt. 1969). Further, in *Rader*, this Court denied *certiorari*, 404 U.S. 983. In the instant case, the Court of Appeals for the Third Circuit has reached the same result as did the Seventh Circuit in *Rader*. This hardly constitutes grounds for action by this Court.

The sole decision favorable to petitioners herein is *Laitram Corp. v. Deepsouth Packing Co.*, 279 F.Supp. 883 (E.D. La. 1968). There, the court held that a Section 5 FTC Act proceeding had no tolling effect since it was not an "antitrust law", as that term is defined in Section 1 of the Clayton Act, 15 U.S.C. §12. To reach that conclusion the Court necessarily construed Section 5(b) of the Clayton Act as nonseverable from Section 5(a), which deals with the *prima facie* effect of final judgments. Yet, the severability of the two sections has been made clear by this Court in *Minnesota Mining, supra*, 381 U.S. at 316-18.

CONCLUSION

The court below has followed the clear weight of authority, and its decision is fully consonant with its prior rulings, decisions of this Court and Congressional intent. Further, no conflict between circuits exist. Thus, petitioners have failed to assert any reason why this Court should grant *certioari*, and the petition should be denied.

Respectfully submitted,

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